



**COMMONWEALTH of VIRGINIA**  
*Office of the Attorney General*

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*Statement of Senior Assistant Attorney General Joshua Lief Regarding the Attorney General's Office Investigation Into the November 2, 2010 Election in Montgomery County*

The following is the statement of Senior Assistant Attorney General Joshua Lief delivered to the State Board of Elections on April 29, 2011.

**FACTUAL SUMMARY**

- On January 31, 2011, the State Board of Elections unanimously requested that the Attorney General conduct an investigation of the November 2, 2010 general election in Montgomery County pursuant to Va. Code § 24.2-104.
- Va. Code § 24.2-104 provides in pertinent part: When the State Board makes its request pursuant to a unanimous vote of all members, the Attorney General . . . shall exercise the authority granted by this section to conduct an investigation, prosecute a violation, assure the enforcement of the elections laws, and report the results of the investigation to the State Board.
- On March 29, 2011, this Office with assistance from SBE and the Montgomery County Commonwealth's Attorney's Office conducted a fact-finding investigative meeting in Christiansburg. Before March 29<sup>th</sup>, I conducted dozens of phone interviews and received many emails from citizens about their concerns.
- The core complaint relating to the November election had to do with the failure of election officers in certain precincts to open electronic poll books ("EPB") on election morning and an *ultra vires* procedure (the "Procedure") temporarily adopted to deal with this failure.
- Pursuant to Va. Code § 24.2-653, when the GR cannot verify that someone is registered to vote, the voter is supposed to vote by a paper provisional ballot that the local electoral board ("EB") will then verify or not the day after the election. The use of provisional ballots is covered in training by the SBE, in their guidance documents and in the GR's Handbook.

- Here, in Montgomery, when the EPBs failed in 6 precincts, rather than use provisional ballots, election officers were instructed to check a voter's identification, enter their name and information on a legal pad (or in some precincts the officers wrote down the information from the identification), and then the voters were permitted to vote on electronic voting machines. The Procedure, in violation of the Code of Virginia, allowed voters whose registration could not be verified to vote, with no way of voiding their vote if they had not been duly registered.
- Approximately 750 voters voted through the Procedure. All of them were later verified that day as being properly registered voters in Montgomery.
- 13 of the voters voted in the wrong precinct. Those voters who cast ballots in the wrong precincts were NOT qualified voters and, thus, those votes were improperly cast and improperly counted.
- The election was decided by a margin of 95,726 to 86,743.
- In terms of the origin of the unlawful Procedure, our investigation revealed the following.
  - The GR conducted training on at least two occasions for use of the EPBs, including one in close proximity to the election.
  - There was a dispute among the witnesses as to whether the training was adequate. After training was complete, the GR printed paper poll books for 8 precincts where he thought the Chief Officers did not seem fully confident in use of EPB's during training.
  - It is my opinion based upon consultation with SBE staff that the instructions from the GR were adequate, but that if a person skipped one step that wasn't spelled out as clearly as it could have been, the EPBs would not open. The issue was that the voter registration information is stored on a detachable "thumb drive" and if they inadvertently accessed the internal C drive, the EPB would not open. Many officers inaccurately believed it was a password problem.
  - When the EPBs at 6 precincts would not open before the polls were scheduled to open, there was a flood of phone calls to the GR's office, starting at about 5am. The GR's office has 4 phone lines. The GR himself was on the phone with precincts walking them through how to get their EPBs open, and reported that he was successful in getting many EPBs open. Cynthia Chappelka, then-secretary of the Montgomery EB, received a phone call from EB member Helen Young about the problem. Ms. Young considered herself knowledgeable with EPB operation, so when the problems first appeared that morning, she had the sheriff's office drive her to various precincts starting with D-5 to help open EPBs.
  - An election officer in precinct D-5 suggested the unlawful Procedure. She suggested it to Ms. Young, who relayed it to Ms Chappelka (who was at the GR's office). Ms. Chappelka wanted to run the idea by the GR, but he was on the phone coaching other precincts on how to get their EPBs open. With lines forming outside polling places, their belief that it could be a county-wide problem, and the belief that there were not adequate paper ballots for the entire county, Ms. Chappelka approved the Procedure at 6:01 on election day. Ms. Young was also involved in the decision to adopt the Procedure.

- There was no evidence that the GR was aware of or approved the Procedure at the time it was adopted. Ms. Chappelka stated that she went into his office several times, but that he was on the phone and she could not be sure whether he heard her describe the Procedure or not. The GR stated that as soon as he learned of the Procedure, his reaction was that they should be using provisional ballots.
- Despite the GR's reaction, however, the GR did not attempt to halt use of the Procedure, but instead kept focusing on assisting officers in getting EPBs open and in printing additional paper poll books.
- In sum, the unlawful Procedure was adopted at 6 precincts in the county. At 5 of those, they confirmed that the voters were registered and preserved the handwritten lists. At precinct B-1, when they got a paper poll book delivered, they confirmed that the voters on the lists were in fact registered and then destroyed the list. This was contrary to SBE instructions to the GR and the GR's instruction to his Chiefs.
- In conclusion, it is clear that a violation of election law occurred in the county on November 2, 2010. It is also clear that it was not to attempt to corrupt the election, alter the results or allow non-registered voters to vote.

### **POTENTIAL ACTIONS**

- Va. Code § 24.2-104 states that the Attorney General shall “exercise the authority granted by this section to conduct an investigation, prosecute a violation, assure the enforcement of the elections laws, and report the results of the investigation to the State Board.” As set forth above, it is clear that the law was violated.

#### **1. Criminal Prosecution**

- These violations could be pursued as either a Class 5 felony or Class 1 Misdemeanor.
  - Va. Code § 24.2-1001 states:
    - A. If any . . . . member of an electoral board . . . is guilty of willful neglect of his duty, he shall be guilty of a Class 1 misdemeanor.
    - B. If any person listed in subsection A is guilty of any corrupt conduct in the execution of his duty, he shall be guilty of a Class 5 felony.
  - Va. Code § 24.2-1017 states that “[a]ny conduct made unlawful by this title, for which no punishment has been otherwise provided, shall be a Class 1 misdemeanor.
- Based on the totality of the circumstances, it was my recommendation that the OAG not pursue a criminal action in this matter.

#### **2. State Board Action**

- SBE in its request for this investigation asked that the OAG to report back to it with its findings.

- As per discussions with SBE Secretary Palmer leading up to today's meeting, it is my recommendation that the State Board issue a letter of censure to the Electoral Board and General Registrar for violations of Virginia law.
  - The letter of censure from SBE should at minimum state that the Virginia code was violated, that going forward Montgomery County should focus on better training, make sure that adequate provisional ballots are printed, and to seek guidance from the SBE if a problem arises where they are not sure of how to cure the problem.
- If in future elections there are violations of law that are traceable to the EB and/or the GR, they should be considered to be on notice that SBE will seek their removal pursuant to Va. Code § 24.2-233.